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VIA HAND DELIVERY

January 9, 2003

EX PARTE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W
Washington, D.C. 20554

Re: Oral **Ea** *Parte* Presentation
CC Docket Nos. 01-337, 02-33, 98-10. 95-20, 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 8, 2003, Dave Baker, Vice President, EarthLink, and the undersigned met with Commissioner Kevin Martin, Daniel Gonzalez (Senior Legal Advisor to Commissioner Martin), Catherine Bohigian (Legal Advisor to Commissioner Martin), and Emily Willeford (Special Assistant to Commissioner Martin). During the meeting, EarthLink described its ISP business, including its high-speed Internet services, and reiterated several points that it made in previously filed coniments, reply comments, and *ex parte* presentations in the above-referenced dockets.

EarthLink stated that Title II of the Communications Act requires that *Computer II* rules apply to ILEC-provisioned wholesale DSL. Within this framework, some deregulation may be appropriate once market conditions show a greater degree of competitive alternatives for wholesale broadband access for ISPs. Noting the Commission's desire to eliminate uncertainty and instability, EarthLink stated that in its view, Title I regulation of incumbent LEC-provisioned wholesale DSL would create much greater legal uncertainty and business risk than would continued Title II jurisdiction over DSL services. EarthLink noted that Title II still allows for appropriate deregulation, as the Commission did in its December 31st Order in CC Docket No. 01-337. Further, continued Title II regulation of incumbent LEC DSL does not entail TELRIC pricing for the incumbents, and there is no established causal relationship between current regulation and the Incumbent LEC market share vis-a-vis cable operators.

While deregulation of yet-unbuilt "new wires" of incumbent LECs may be appropriate, current incumbent LEC-provisioned wholesale DSL operates on "old wires", i.e., existing infrastructure which has been paid for by ratepayers and extensively depreciated by incumbent LECs over the years. EarthLink further argued that as DSL is generally the only broadband input available to ISPs, ILECs should be viewed as continued dominant providers of DSL, as opposed to non-dominant providers of broadband generally. Impediments to cross-platform migration for consumers, such as high CPE costs and early termination fees, further warrant treatment of the ILECs as dominant providers in the market for wholesale DSL.

EarthLink also expressed its support for the continuation of line sharing as a UNE. EarthLink purchases DSL loops from Covad as well as from incumbent LECs. Covad provides a competitive wholesale DSL alternative for EarthLink and other ISPs offering high-speed Internet access. Eliminating line-sharing would hinder Covad's ability to offer this competitive service, ultimately further consolidating the high-speed Internet access market to just the two facilities-based providers. Requiring CLECs to purchase the entire loop, and offer both voice and DSL, would not promote competitive alternative DSL. Moreover, a decision that forces CLECs to negotiate a line sharing arrangement with incumbent LECs not based on TELRIC pricing would lead to discrimination and price squeeze of CLEC DSL providers.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, fourteen copies of this Notice arc being provided *to* you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,

Mark J. O'Connor
Counsel for EarthLink, Inc.

CC: Commissioner Kevin Martin
Daniel Gonzalez
Catherine Bohigian
Emily Willeford